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No. 80-521

In The

Supreme Court of the United States

October Term, 1980

Loudoun Times-Mirror, et al.,
Petitioners,

v.

Arctic Co., Ltd., t/a
Iroquois Research Institute,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Motion for Leave to File a Brief as Amici Curiae by The Reporters Committee for Freedom of the Press; The American Newspaper Publishers Association; The American Society of Newspaper Editors; The Associated Press Managing Editors; The National Association of Broadcasters; The National Newspaper Association; The Radio-Television News Directors Association; The Society of Professional Journalists, Sigma Delta Chi; and The Virginia Press Association; and Brief in Support of the Petition for a Writ of Certiorari.

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The Reporters Committee for Freedom of the Press, the American Newspaper Publishers Association, the American Society of Newspaper Editors, the Associated Press Managing Editors, the National Association of Broadcasters, the National Newspaper Association, the Radio-Television News Directors Association, The Society of Professional Journalists, Sigma Delta Chi, and the Virginia Press Association join together to move the Court

for leave to file a brief as *amici curiae* in support of the Petition for a Writ of Certiorari in this case. The consent of the petitioners, the Loudoun Times Mirror, Kyle Parks, and R.E. McDaniel, has been obtained. The consent of the respondent, Arctic Company, has been requested and denied. As organizations whose members are engaged in the gathering and dissemination of news reports concerning matters of public interest, movants believe that the ability of their members to serve the public has been greatly encumbered by the decision below.

Movants believe that their brief as *amici curiae* will aid this Court by (1) clarifying the far-reaching ramifications of the Court of Appeals decision for reporting the news, (2) describing how this decision, if permitted to stand, will inhibit criticism of governmental affairs, and (3) elucidating why the decision below is flatly inconsistent with well-established principles of constitutional law articulated by this Court and in conflict with numerous other lower court rulings.

Accordingly, movants respectfully request this Court to grant leave to file their accompanying Brief in Support of the Petition for a Writ of Certiorari.

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INTEREST OF AMICI CURIAE

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment and freedom of information interests of the press.

The American Newspaper Publishers Association is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of the "dignity and rights of the profession" (Society Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Associated Press Managing Editors is an organization of 600 editors of newspapers affiliated with the Associated Press, which is the largest newsgathering organization in the world. It is extremely interested in First Amendment problems and has been active in furthering the interests of a free press.

The National Association of Broadcasters is a trade association consisting of over 5,200 radio and television stations and all the nationwide commercial broadcast networks. Among its primary concerns is maintaining the vitality of the First Amendment guarantee of freedom of the press.

The National Newspaper Association is a trade association consisting of more than 5,500 weekly and daily newspapers located throughout the United States. A major purpose of the Association is to preserve the constitutional guarantee of freedom of the press for community newspapers.

The Radio-Television News Directors Association is a not-for-profit professional organization of journalists which includes approximately 1,700 members who are active in the supervision of gathering, reporting and editing of news and other information broadcast by the national networks and by local radio and television stations throughout the nation.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of nearly 35,000 members representing every branch and rank of print and broadcast journalism. The Society works to preserve the public's right to know, to require that the public's business be conducted in public and to keep governmental records open to public inspection.

The Virginia Press Association is a not-for-profit corporation registered in the Commonwealth of Virginia representing a majority of the daily and weekly newspapers published in Virginia. The purpose of the Association is to expedite programs and activities furthering the editorial excellence of these newspapers and their service to the citizens of Virginia. It maintains a commitment to defend the First Amendment and freedom of information.

If the decision of the Court of Appeals is not reversed, the membership of these *amici* will be adversely af-

fected in their ability to report on and criticize the performance of government.

SUMMARY OF ARGUMENT

The growth of American government over the past several decades has generated a new arm of public authority: contractors and consultants. Initially pervasive in aerospace and defense operations, the use of consultants and contractors has proliferated throughout federal, state and local government and shows no sign of abatement. Indeed, the distinctive symbiotic relationship created between government and these consultants and contractors satisfies the political and scientific exigencies of our times so well that they may soon surpass the full-time employee as the chief *de facto* policymaker in government.

It is in this context that the decision of the Court of Appeals below should be reviewed. The decision denies the press and public requisite First Amendment protection when reporting on the conduct of public affairs by government consultants and contractors. In refusing to classify these firms and individuals as "public officials" or "public figures" when they bring defamation actions, the Court of Appeals has excluded an entire arm of government from the constitutional requirements of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

The *New York Times* privilege encompasses criticism of *all* those responsible for performing the functions of government, not simply elected officials or full-time employees. *See Rosenblatt v. Baer,* 383 U.S. 75, 85 (1966); *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967). Government contractors and consultants fall squarely within this category when they are engaged in the formulation or implementation of governmental policy. It is the nature of their participation in public affairs – *i.e.,* their

significant role in the governmental process — that renders them subject to the "actual malice" standard.

The decision of the Court of Appeals, holding that a government consultant need not prove "actual malice," stands in direct conflict with *New York Times* and its progeny. Unless reversed by this Court, it threatens to stifle public and press criticism of this class of actors increasingly responsible for the conduct of governmental affairs.

ARGUMENT

THE COURT OF APPEALS DECISION UNCONSTITUTIONALLY DENIES THE PRESS AND PUBLIC THE REQUISITE FIRST AMENDMENT PROTECTION WHEN REPORTING ON THE CONDUCT OF PUBLIC AFFAIRS BY GOVERNMENT CONTRACTORS AND CONSULTANTS.

This case squarely presents perhaps the most significant unresolved issue in the constitutional law of defamation: whether the press and the public can rely upon the safeguards enunciated in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), when reporting on the host of contractors and consultants increasingly responsible for the conduct of governmental affairs. In refusing to classify these firms and individuals as "public officials" or "public figures" when they bring defamation actions, the Court of Appeals has disavowed the "central meaning of the First Amendment," as expounded by this Court in *New York Times,* 376 U.S. at 273, and has denied the press the "breathing space" so essential to robust scrutiny of the

conduct of governmental affairs in a democracy, *id* at 271-72.[1]

The role played by the Iroquois Research Institute ("Iroquois") in this case epitomizes a well-documented trend in modern America – the growing delegation of a plethora of governmental functions to consultants and contractors. In fiscal year 1979, the federal government alone awarded 13,848 such contracts,[2] at a cost of between $9.3 and $13.4 billion.[3] Some $30 million in federal revenues are paid to

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[1]Unlike recent defamation cases accepted for review in this Court, *see, e.g.*, Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) (subject of contempt citation); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (research scientist); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (party in divorce litigation); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (private attorney), this case involves a defamation plaintiff who complains about press criticism of his performance of a governmental function. Indeed, this case illustrates an unfortunate byproduct of this Court's recent attempts to stem unwarranted expansion of the application of the "actual malice" standard. The Court of Appeals, by mechanical reference to tests devised for those whose conduct has scant relevance to governmental affairs, has seriously inhibited the criticism of government that lies at the heart of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In contrast, other courts have applied the "actual malice" standard to plaintiffs who can not, by any stretch of the imagination, be said to have played a role in the governing process, even though they clearly satisfy the definition of a "public figure" set forth in *Gertz, Firestone, Wolston,* and *Hutchinson. See, e.g.*, Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980) (former girlfriend of Elvis Presley). *Amici* urge the Court to take advantage of this opportunity to re-affirm, for the benefit of lower courts, the continued vitality of the *New York Times* doctrine in cases, such as this, in which the press has been inexplicably denied protection derived from the theoretical underpinnings of the doctrine.

[2]*See* Wash. Post, June 22, 1980, at A1, col. 1 (copies on file with the Clerk of the Court).

[3]*Compare id.* ($9.3 billion) *with id.*, June 25, 1980, at A10, col. 2 (Office of Management and Budget asserts $13.4 billion spent on contracts in fiscal 1979).

contractors and consultants each day, more than $1 million every hour.[4] President Carter has estimated that the United States is currently a party to approximately 30,000 such contracts, involving 10,777 individual appointments.[5]

The federal government has delegated the activities of all three branches to these contractors and consultants,[6] with the greatest impact felt in the executive branch. The Comptroller General has concluded that administrative agencies frequently rely on consultants "for making policy, management, and program decisions."[7] Often, a contract is awarded precisely because the government itself lacks the expertise to formulate policy or implement it effectively.[8] As a result, there is considerable evidence that government rarely scrutinizes and routinely accepts the recommendations of its contract employees.[9]

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[4]*Id.*, June 22, 1980, at A16, col. 1; *id.*, June 24, 1980, at A1, col. 2.

[5]*Comptroller General, Controls Over Consulting Service Contracts of Federal Agencies Need Tightening* 38 (Mar. 20, 1980) (reprinting, Memorandum for the Heads of Executive Departments and Agencies (May 12, 1977)).

[6]Contractors and consultants play an instrumental role in the legislative process, often preparing the official Congressional testimony of governmental officials concerning proposed legislation. *Id.* at 13. Although it is not precisely relevant to the issues raised by the instant case, it may also be observed that the judicial branch, through the increasing use of special masters and arbitrators, has arguably delegated a portion of the judicial function as well. *See generally,* Note, *"Mastering" Intervention in Prisons,* 88 Yale L.J. 1062 (1979) (special masters); Rehnquist, *A Jurist's View of Arbitration,* 32 Arb. J. (n.s.) 1 (1977) (arbitration).

[7]*Comptroller General, supra* note 5, at 30.

[8]*Id.* at 27.

[9]Wash. Post, June 22, 1980, at A14, col. 6.

This phenomenon has also been felt at the local level. A recent study found that 91% of the 2,625 cities surveyed had engaged a consultant at least once in the preceeding two years.[10] Some cities entered into as many as 400 consulting contracts during this period.[11] These consultants were most often employed to undertake "planning and development" decisions on behalf of city government, usually because the "official" government lacked "sufficient in-house staff, the . . . skills to complete a particular project" or desired "an independent opinion."[12]

The extent to which governmental functions are delegated to contractors and consultants can hardly be overestimated. Nearly 90% of the budget of the Department of Energy ("DOE"), some $11 billion, is paid to consultants and contractors.[13] Indeed, DOE has entered into approximately 4,000 such contracts, involving 200,000 workers or nearly ten times the Agency's internal staff of 21,000.[14] In recent joint Congressional hearings, Senator David Pryor aptly described the result of the government-contract phenomenon as "a basic change in the way government does its work. It is hard to understand," he concluded, "what, if anything, is left for federal employees to do."[15]

The transfer of governmental functions to contractors and consultants has been properly followed by increasing

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[10] *International City Management Association, Municipal Consultants: Patterns and Practices* 1 (Dec. 1979).

[11] *Id.* at 3.

[12] *Id.* at 2-3.

[13] Wash. Post, June 25, 1980, at A1, col. 1.

[14] *Id.*

[15] *Id.*

press coverage. This scrutiny has exposed conflicts of interest, waste, favoritism, and substandard performance, as well as evidence that government frequently uses contractors and consultants effectively.[16] Yet, the decision of the Court of Appeals threatens to inhibit the press from reporting on and criticizing the performance of this newest arm of government. *See New York Times Co., supra,* 376 U.S. at 282.

In its decision below, the Court of Appeals holds that Iroquois is neither a public official nor a public figure, thereby relieving it of the burden of proving "actual malice."[17] The Court's opinion, written by Judge James M. Sprouse, wholly ignores the explicit factual findings of the district court, Albert V. Bryan, J., detailing Iroquois's central role in the governmental process.[18] Judge Bryan found that Iroquois, an archaeological consulting firm, had been hired by the Fairfax County (Virginia) Water Authority ("FCWA") to review the environmental impact of its plan to build a water-intake facility on Lowes Island in Loudoun County, Virginia.[19] Federal law charged FCWA with the task of conducting this review, but permitted the government agency to delegate its performance to a consultant such as Iroquois.[20] According to Judge Bryan, the FCWA project and the island had "become the

[16] *See, e.g.,* Minn. Tribune, Aug. 17, 1980, at 1A; Wash. Post, June 22, 1980, at A1, col. 1; Wash. Post, June 23, 1980, at A1, col. 1; Wash. Post, June 24, 1980, at A1, col. 1; Wash. Post, June 25, 1980, at A1, col. 1.

[17] Arctic Co. v. Loudoun Times Mirror, No. 79-1121 (4th Cir. July 3, 1980) (reprinted in Petitioner's Appendix at 1a).

[18] Arctic Co. v. Loudoun Times Mirror, Nos. 78-786-A & 78-817-A (E.D. Va. Dec. 18, 1978) (reprinted in Petitioner's Appendix at 9a).

[19] *Id.* at 11a.

[20] *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976); National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470t (1976).

focal point of public concern because of the archaeological treasures believed to be beneath its surface."[21] Iroquois, the judge found, injected itself into this controversy by concluding, in its final report, that the FCWA project site was the best of all alternative locations,[22] and that archaeological treasures located on the site could be safely removed.[23] Thus, there was, according to Iroquois, no need to preserve the site by denying a construction permit to its employer, FCWA, contrary to the view of many opponents of the project. Iroquois's findings and conclusions were in turn presented to the United States Army Corps of Engineers, which thereafter granted the requested permit to FCWA.[24]

The newspaper article at issue in this litigation constitutes a report about this public controversy, as well as Iroquois's role in it. Specifically, the article quotes another archaeologist, petitioner McDaniel, who was critical of Iroquois's study methods and conclusions.[25] These criticisms of Iroquois's performance on behalf of FCWA form the basis of Respondent's claim and constitute a textbook example of the kind of expression that *New York Times* seeks to protect.

In *New York Times*, this Court created the "actual malice" standard so that press and public alike would be "uninhibited" in criticizing those responsible for formulating and implementing governmental policy. 376 U.S.

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[21] Arctic Co. v. Loudoun Times Mirror, Nos. 78-786-A & 78-817-A, at 11a (E.D. Va. Dec. 18, 1978) (page citation to Petitioner's Appendix).

[22] *Id.* at 12a; *see* Petitioner's Appendix at 47a.

[23] *See* Petitioner's Appendix at 47a.

[24] Arctic Co. v. Loudoun Times Mirror, Nos. 78-786-A & 78-817-A, at 12a (E.D. Va. Dec. 18, 1978) (page citation to Petitioner's Appendix).

[25] *Id.*

at 270. The Court recognized that a citizen's ability to criticize the performance of governmental functions "is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *see First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). To permit the subjects of this criticism to punish the "citizen-critic of government," *New York Times Co., supra*, 376 U.S. at 282, would be tantamount to a prosecution for seditious libel, *id.* at 276.

The First Amendment privilege in libel law encompasses criticism of *all* those responsible for performing the functions of government, not simply elected officials or full-time public employees.[26] In *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966), this Court emphasized that "[c]riticism of those responsible for government operations must be free, lest criticism of government be penalized." Accordingly, the "actual malice" standard must apply

> at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. *Id.* [emphasis added].

Indeed, in a concurring opinion, Mr. Justice Douglas recognized that the "actual malice" rule must extend as well to "those who contract to carry out governmental missions" since they "are as much in the public domain as any so-called officeholder." *Id.* at 89 (Douglas, J., concurring).

The full court endorsed Justice Douglas's view in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). In the con-

[26]The "actual malice" rule has consistently been applied to candidates for public office, even though they hold no governmental post. *See, e.g.*, James M. Sprouse v. Clay Communications, Inc., 211 S.E.2d 674 (W.Va. 1975) (court recognizes "chilling effect" of $750,000 jury award to gubernatorial candidate).

trolling opinion in that case, Mr. Chief Justice Warren explained that "[i]ncreasingly in this country, the distinctions between governmental and private sectors are blurred," due, in large part, to the "surging growth of science and technology." *Id.* at 163. Thus,

> [i]n many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions. *Id.* at 163-64 (Warren, C.J., concurring).

Government contractors and consultants fall squarely within this category when they are engaged in the formulation or implementation of governmental policy. It is the nature of their participation in public affairs — *i.e.*, their significant role in the governmental process — that renders them subject to the "actual malice" standard. Whether they are classified as "public officials" or "public figures" is of little consequence, so long as the "critic of official conduct" is free to contribute to an "uninhibited, robust, and wide-open" debate on the performance of his government. *New York Times Co., supra,* 376 U.S. at 270.[27]

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[27]None of this Court's recent defamation cases involved claims by plaintiffs who performed governmental functions. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (private attorney); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (party in divorce litigation); Wolston

Prior to the Court of Appeals decision below, both this and lower courts had faithfully and consistently applied the *New York Times* standard to contractors and consultants who, like Iroquois, have voluntarily entered into a symbiotic partnership with government. The standard has been applied to so-called "independent" contractors engaged in the performance of public duties, including, *inter alia,* sanitation collection,[28] traffic control,[29] and

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v. Reader's Digest Ass'n., Inc., 443 U.S. 157 (1979) (subject of contempt citation); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (scientist engaged in "pure" research under government grant). In all these cases, this Court made clear that the "actual malice" standard applies not only to those who formulate and implement public policy, but also to those who voluntarily "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974); *see* Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler, 398 U.S. 6, 9 (1970) (plaintiff who sought controversial construction permit "fell within even the most restrictive definition of a 'public figure' "). Since the plaintiffs in *Gertz, Firestone, Wolston,* and *Hutchinson* neither performed governmental functions nor voluntarily injected themselves into public controversies, this Court held they were not subject to the "actual malice" rule.

Although *Hutchinson* dealt with a plaintiff who had obtained federal funding for his research concerning aggression in monkeys, the Court did not address the issue presented here. The Court in *Hutchinson* expressly declined to consider whether Mr. Hutchinson was a "public official," *see* 443 U.S. at 119 n.8, and he was clearly not engaged, like Iroquois, in the formulation or implementation of public policy having any practical or political impact on the general public.

[28]*See* Arizona Biochemical Co. v. Hearst Corp., 302 F. Supp. 412 (S.D.N.Y. 1969).

[29]*See* Clawson v. Longview Publishing, 4 *Media L. Rep. (BNA)* 2163 (Wash. Jan. 5, 1979).

motor vehicle registration. [30] Other courts have consistently required the standard to be met by contractors involved in the formulation of governmental policy in such fields as space exploration,[31] national defense,[32] and property taxation rates.[33] As Judge Bryan made clear, none of these contractors or consultants had more influence over governmental decisionmaking than Iroquois's central role in formulating environmental policy for Loudoun County.

The decision of the Court of Appeals, therefore, stands in direct conflict with the lion's share of decisions rendered under *New York Times*. Worse, it suggests an avenue by which elected officials may avoid public scrutiny or chill criticism simply by delegating their public responsibilities to contractors and consultants. Ironically, such a built-in incentive would only contribute to the proliferation of these already ubiquitous public servants. Unless reversed by this Court, the Court of Appeals decision threatens to stifle public and press criticism of this class of actors increasingly responsible for the conduct of governmental affairs. By depriving the citizenry of these press reports about the operation of its government, the Court of Appeals decision has subverted the "central meaning" of the First Amendment.

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[30]Hodges v. Oklahoma Journal, 6 *Media L. Rep. (BNA)* 1750 (Okla. June 24, 1980); *see also* Alexander v. Lancaster, 330 F. Supp. 341 (W.D. La. 1971); Bishop v. Wometco Enterprises, Inc., 235 So. 2d 759 (Fla. App.), *cert. denied*, 240 So. 2d 813 (Fla. 1970); *but cf.* Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976) (civil engineer employed part-time by municipality not public figure).

[31]Adey v. United Action for Animals, Inc., 361 F.Supp 457 (S.D.N.Y. 1973) (Weinfeld, J.), *aff'd mem.*, 493 F.2d 1397 (2d Cir. 1974).

[32]Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F.Supp. 947 (D.D.C. 1976), *aff'd mem.*, D.C. Cir., Mar. 31, 1978.

[33]Gleichenhaus v. Carlyle, 5 *Media L. Rep (BNA)* 1602 (Kan. July 14, 1979).

CONCLUSION

For the reasons herein stated, your *amici* respectfully request the Court to grant certiorari in this action.

Respectfully submitted,

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APPENDIX

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Re: Loudoun Times-Mirror, et al. v. Arctic Company, Ltd., t/a Iroquois Research Institute, No. 80-521

Dear Mr. Sanford:

As counsel to the petitioners in this case we consent to your filing an amicus brief in this proceeding on behalf of a number of national press organizations. We understand that you will file this brief no later than November 24, 1980, in compliance with the extension of time granted to the respondent.

Very truly yours,

/s/ Michael S. Horwatt
Michael S. Horwatt

MSH:dl